

G55ASMAHps

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SMART INSURANCE COMPANY,

4 Plaintiff,

5 v.

15-cv-4384 (KBF)

6 BENECARD SERVICES, INC., et al.,

7 Defendants.

8
9 New York, N.Y.
10 May 5, 2016
11 9:00 p.m.

12 Before:

13 HON. KATHERINE B. FORREST

14 District Judge

15 APPEARANCES

16 DENTONS US LLP

Attorneys for Plaintiff

17 BY: GARY MEYERHOFF, ESQ.

18 DLA PIPER

Attorneys for Defendants

19 BY: BRIAN JOHN PENDLETON, JR.

20 BY: RICHARD F. HANS, ESQ.

STEVEN R. MARINO, ESQ.

21 Also Present: Gina Trimarco, Esq.
22
23
24
25

1 (In open court)

2 THE CLERK: In the matter Smart Insurance Company v.
3 Benecard Services, Inc., at al., 15-cv-4384, counsel please
4 state your names for the record.

5 MR. MEYERHOFF: Gary Meyerhoff from the law firm of
6 Dentons US LLP for Smart Insurance Company, plaintiff.

7 THE COURT: Good morning, Mr. Meyerhoff.

8 MR. PENDLETON: Good morning, your Honor. John
9 Pendleton from DLA Piper. With me is my partner Rich Hans,
10 Steve Marino, and our former counsel, who is now in-house
11 counsel at UBS, Gina Trimarco.

12 THE COURT: Good morning, folks.

13 We are here for a hearing on some of the evidentiary
14 issues that underlie the Smart motion for contempt that was
15 filed back early in April, at ECF no. 77, and the purpose that
16 I have for today's proceeding is, as my order set forth, is
17 really to hear from Mr. Pendleton and Ms. Trimarco about
18 everything that they can recall that happened during this phone
19 call with Mr. Reed on January 28, 2016. And we'll do that in
20 just a moment. We'll do it separately. What we'll do is,
21 we'll have one of you step out. We'll swear one of you, put
22 under oath, have you go through absolutely everything you can
23 recall, and then we're going to have the other one come in and
24 do the same thing.

25 All right. The concern I have is that when I watched

G55ASMAHps

1 Mr. Reed's deposition, the videotape, it didn't seem that he
2 lacked clarity on the material content of the conversation.
3 Whether the words were precisely the same or not, I don't know.
4 So whether there was, quote, an instruction or not, I don't
5 know what folks might mean by the word "instruction." So I
6 just need as a result to get to the bottom of it, so that I can
7 make sure that I understand as much as possible about what
8 happened. And even if people don't remember the words,
9 describe to me what happened.

10 Where we go from there, let me just be absolutely
11 clear, where we go from there is TBD, in all respects. In
12 other words, there are many results that could follow. It is
13 not something that I would relish to do -- I would not relish a
14 contempt sanction against two very competent, upstanding
15 lawyers. And so I'm not aiming a laser sight on that. This is
16 a fact-finding proceeding with everything else TBD. And we're
17 not going to TBD today. What I'm going to do is listen to you
18 folks -- because I don't think today will be that long, to tell
19 you the truth. I'm going to listen to you folks. I'm going to
20 go back and I'm going to think hard about that and I'm going to
21 think hard about the next steps.

22 Does that sound like a reasonable plan for people?

23 MR. PENDLETON: Yes, your Honor.

24 MR. MEYERHOFF: Yes, your Honor.

25 THE COURT: All right. Now, needless to say, I know I

G55ASMAHps

1 don't have to say this to you folks. I know that you folks as
2 lawyers understand exactly what your obligations are under
3 oath. But I do urge you to be as forthcoming as possible with
4 every word, no matter what the words are. I'm not suggesting
5 that there are words that are anything other than what's in the
6 declaration. But if there were or there were concepts or
7 anything else, I urge you to be as forthcoming as possible.

8 And I also know that there must be a great level of
9 frustration if nothing happened other than what you have
10 indicated in your declaration, construed as broadly as humanly
11 possible. If nothing else happened, then the very idea of
12 being called here today to do what I'm asking you to do would
13 be infuriating and unnecessarily unnerving. And to the extent
14 that that is the case, I'm sorry. The issue for me is, I don't
15 know what happened. And so having listened and seen the
16 deposition, I am at a point where, before I can resolve this
17 motion, I've got to get some additional facts.

18 So I want to acknowledge on both sides that this is
19 entirely TBD and that such proceedings are things which,
20 frankly, I rarely have these kinds of motions. I hate these
21 kinds of motions, because they are often difficult and are
22 suggestive of cases, at the very least, cases being down
23 another track other than the merits of the litigation, right.
24 Whether there's something that's really happened or something
25 that's just being accused of that hasn't really happened,

1 either way, we are on a sidetrack from the main litigation.
2 And so it's not where anybody wants to be.

3 So with all of that said, since we were in agreement
4 that this is going to be a relatively short proceeding for the
5 purpose that I said, what I'd like to do is, why don't we take
6 Mr. Pendleton first. Ms. Trimarco, if you wouldn't mind just
7 stepping out. There are a couple of witness rooms to the
8 right, and then there's also the jury room right back there,
9 either place. And we'll come get you in just a minute.

10 (Ms. Trimarco left the courtroom)

11 THE COURT: Fantastic. Mr. Pendleton, we're going to
12 put you under oath so we can have that formality taken care of.
13 I nevertheless just want to assure you that I would never
14 expect that if you were not under oath you wouldn't be entirely
15 truthful. But we will go ahead and undertake the formality.

16 BRIAN JOHN PENDLETON, JR.,

17 called as a witness, having been duly sworn, testified as
18 follows:

19 THE COURT: All right, Mr. Pendleton. Tell me what
20 happened on January 28.

21 THE WITNESS: Well, I woke up very early in the
22 morning, your Honor, and I got on a plane, and I flew for about
23 three hours. And I arrived --

24 THE COURT: I'm going to actually ask you not to look
25 at your notes, only because I -- I tell you what. You can look

G55ASMAHps

Pendleton

1 at them at the end. But I want you just to sort of give me
2 your best recollection as we stand here. You can look at them
3 at the end to make sure that you've captured everything.

4 THE WITNESS: OK. I arrived at my destination at
5 approximately 9 a.m. Between 9:30 and 10 a.m., I telephoned
6 Gina Trimarco at my office to go over outstanding items in a
7 case called Smart v. Benecard, and there were a number of them,
8 your Honor. We had just started, as your Honor may remember
9 from the papers that are before you, we had started the process
10 of scheduling depositions and figuring out who was going to be
11 deposed on what schedule. We had had a very long conference
12 call with Mr. Barnowski. Apparently Mr. Meyerhoff was on the
13 call. We did not know that at the time. But we had a long
14 call with Mr. Barnowski. And so on Thursday morning, January
15 28, I was going over with Gina where we stood with a number of
16 the potential witnesses, because we needed to determine
17 whether -- a lot of these people were former employees of
18 Benecard. Mr. Reed was one of those. And I will tell your
19 Honor, in all candor, that Mr. Reed was not somebody on my
20 radar screen really. He was a low-level employee who worked
21 there from August of 2012 until the Tuesday before
22 Thanksgiving, which I think was November 20th of 2012, but I
23 probably shouldn't testify under oath to that. It was the
24 Tuesday before Thanksgiving, according to Mr. Reed's deposition
25 testimony.

1 We had interviewed a number of -- in advance of the
2 litigation, we had interviewed a number of what we thought were
3 the important people at Benecard, both former and current
4 employees. And Mr. Reed was not one of them. So when his name
5 came up in the January 26 conference call, I had heard the name
6 before; he was actually a custodian that they wanted e-mails
7 from, "they" being the Smart side, but I really didn't know who
8 he was or what his job had been. That's truthful, Judge.

9 So we had reached out for him on Tuesday, to find
10 out -- so we were asked by Mr. Barnowski, was he under our
11 control and would we be able to produce him for a deposition.
12 We said we didn't know and we would get back to Mr. Barnowski.

13 So we were reaching out to Mr. Reed. We first tried
14 to reach him on that Tuesday, left a voicemail message, no
15 response. So when I called Gina in the office between 9:30 and
16 10 on Thursday morning, I called her about Mr. Reed. I think
17 there was somebody named Bill Wolfe, and possibly Bruce
18 Shearer. I don't remember exactly who, all of the people that
19 we went over on that call. And I said, all right, let's reach
20 out for them again.

21 So the two of us -- me, outside of the office, on my
22 cellphone; Gina I think was in the office but I'm not sure if I
23 called her on her cellphone or at the office, and one goes to
24 the other so you don't really know -- and we called Mr. Reed
25 together, expecting, frankly, your Honor, to get another

1 voicemail message. And he answered the phone.

2 THE COURT: So this is in the morning on the 28th.

3 THE WITNESS: This is in the morning, approximately --
4 again, I don't -- I was hoping that there was -- I couldn't get
5 any records of the length of the phone call. But I know the
6 phone call was approximately five minutes.

7 We had a very nice, pleasant discussion with Mr. Reed.
8 We introduced ourselves. We told him that we represented
9 Benecard in a litigation that had been filed against it in the
10 federal court in New York City. And we explained to him what
11 the case was about.

12 And my recollection, Judge, is that he didn't indicate
13 one way or the other that he knew about the litigation.

14 We explained to him that the other side was interested
15 in taking his deposition. We explained to him what that would
16 entail, meaning they can go for up to seven hours, you are
17 placed under oath to tell the truth, you are asked questions
18 and the lawyers ask you questions, explained the deposition.
19 And I do recall that we had a discussion in the phone call
20 about where the deposition would take place, because we had
21 talked to Mr. Barnowski, and maybe also Mr. Meyerhoff -- I
22 frankly don't remember that conversation because it was
23 earlier, who it all was with -- but it was our preference if we
24 could get witnesses to come to either New York City or Short
25 Hills, where both Dentons and DLA have offices -- Short Hills

1 being in New Jersey -- that it would be better. And so some of
2 the Benecard witnesses who work in Harrisburg, Pennsylvania,
3 had come to the Short Hills location for their deposition.

4 So we talked to him about whether he would be willing
5 to travel to either New Jersey or New York for the deposition,
6 to obviate the need for all the lawyers to go out there. And
7 my recollection is that he told us that he would prefer to have
8 the deposition taken in Harrisburg. And so we said fine, we'd
9 taken a number of depositions in Harrisburg in this case, your
10 Honor, including his deposition on March 23. Susan Nafzinger's
11 deposition was over two days, was completed last Friday,
12 started on April 8. And Mr. Jones' deposition was taken last
13 Wednesday, I think that would have been April 26. But all
14 three depositions took place in Harrisburg.

15 We also told him during the call that we would be
16 interested in meeting with him to prepare him for his
17 deposition. And he agreed to do that. And we told him we
18 would be back to him with dates. And we didn't -- we weren't
19 calling him to schedule his deposition yet, because the other
20 side just merely wanted to know if they were going to subpoena
21 him or not, and he agreed to forgo the subpoena. I told him he
22 was entitled to have them subpoena him, he didn't have to
23 voluntarily appear, but that they could easily subpoena him and
24 he would have to appear. And frankly I told him that the
25 advantage of doing it voluntarily is, we could prepare him for

1 his deposition, number one; and, number two, he would have
2 input into the date, and if they subpoenaed him, he may or may
3 not have input into the date. And so he agreed to appear
4 voluntarily and he agreed to meet with us.

5 And that is about as much as I recall about the phone
6 call.

7 If I didn't say it, we did talk about the background
8 of the case. I think I mentioned that. I explained what the
9 case was about.

10 And I hung up the phone.

11 And I logged onto my computer, and I sent him an
12 e-mail confirming the conversation, and asked him in the
13 e-mail -- and the e-mail is before your Honor in our papers.
14 And the e-mail was my attempt to recite what we just discussed,
15 OK. And I didn't intend to leave anything out. I intended to
16 cover it as best I recalled. And so that e-mail was sent at
17 10:40-something that morning, Judge. So it was sent within a
18 half hour or so of the call. It may have been sent within five
19 minutes of the call. I don't remember exactly when the call
20 took place.

21 THE COURT: All right. Was there ever a time during
22 the call when, even if you didn't say to Mr. Reed anything
23 regarding communications he might have with Smart, that he
24 mentioned anything to you? In other words, do you recall
25 whether he said anything along the lines of -- and don't take

1 these as sort of the words he had to have used, the concept --
2 should I be talking to Smart, or do you guys not want me to
3 talk to Smart, or, what do I do if Smart calls? Did he say
4 anything at all that you can recall where he was looking for
5 direction from you in that regard?

6 THE WITNESS: He did not. And I remember this clearly
7 for a couple of reasons. One, I was very surprised to learn
8 that he had met with them in May of 2015, because he never
9 mentioned that during the call. I would have had -- that would
10 have -- my ears would have gone up had I heard that, and I --
11 it would have put a level of concern that he had already spoken
12 with them.

13 Frankly, I, as I said, your Honor, I really didn't
14 know why anybody would want to take his deposition. I didn't
15 know that -- what information he might have. And, you know,
16 his role at Benecard, as it turns out, he was what was called a
17 project manager, and really, if you looked at his entire
18 deposition, you will have seen that he really just kind of ran
19 interference and tried to, when the people from Smart said we
20 need to get an answer to this, he would go to the person at
21 Benecard and say -- he didn't have any substantive involvement
22 at all in the issues, or very little.

23 So, no, I had no knowledge that he had spoken to
24 Smart. And once he had agreed, in my mind -- and this is why
25 I'm pretty clear about this, Judge. Once in my mind he had

G55ASMAHps

Pendleton

1 told me he would sit down and prepare for us, I communicated
2 that to Smart's counsel. And as they themselves have put in
3 the papers, they were then not going to be in a position to be
4 able to talk to him. And nor did I have any sense that they
5 wanted to talk to him. So, no, the idea -- my recollection is
6 that that didn't come up. And I've wracked my brain, as you
7 can imagine -- I think your Honor may have slightly understated
8 it when you said it's -- I wouldn't use the word "infuriating,
9 but it's unsettling at the very least to be doing what I'm
10 doing right now. And I have wracked my brains to try to figure
11 out why he said that. And I can speculate, you know, maybe he
12 asked something like that, Judge. I don't recall it. I have
13 no recollection of it. So if he did, I might have said -- I
14 don't know what -- I would never have said -- I'll be clear. I
15 would never have instructed him not to talk to them.

16 THE COURT: So you remembered at the time you had that
17 call, is it fair to say you remembered my prior order in
18 December of 2015 that said, cease interfering with interviews
19 by Smart of former employees?

20 THE WITNESS: Yes, I remembered --

21 THE COURT: All right. It wasn't as if that word had
22 slipped your mind.

23 THE WITNESS: No.

24 THE COURT: And the instruction in that order was
25 clear to you, and --

1 THE WITNESS: I understand the order. I have read the
2 December 8th order. I remembered it because I wasn't -- I
3 didn't think it was necessarily a hundred percent right, but
4 that's the order. And we gave it our best shot. And we did
5 submit a letter. And your Honor adopted our form of the letter
6 to send them.

7 And to be clear about this, as it turns out, the three
8 witnesses -- I didn't know Reed was somebody they ever wanted
9 to interview, but the three witnesses that they claim that, you
10 know, the basis of this motion, they met with all of them, and
11 they talked to all of them, before their depositions. Each --
12 Jeffrey talked to them in May 2015. Even though they didn't
13 put it in the moving papers, on the initial moving papers, he
14 had spoken to them. And this is the other point I wanted to
15 make to your Honor. He had spoken to them before the
16 deposition. Mr. Barnowski tells you that he in fact did have a
17 call.

18 Mr. Reed, in his deposition, twice, I believe, twice
19 says he never spoke to them, he only had voicemail messages, he
20 never picked up the phone.

21 And the point to be made here -- and your Honor
22 doesn't yet know all about the merits of the case. There would
23 be no way for your Honor to know that. There are a number of
24 points he made --

25 THE COURT: I know almost nothing about the merits of

1 the case, other than what has been in discovery motions and
2 things.

3 THE WITNESS: Right. But my point is, there are a
4 number of facts that he testifies to in his deposition that are
5 inaccurate. And it's not because Mr. Reed is intentionally
6 misleading anybody.

7 THE COURT: And I think you laid that out in your
8 opposition papers.

9 THE WITNESS: I just gave you two examples, about the
10 risk log and the fact that his testimony about when he left,
11 whether he had been offered a job or not, he had said that we
12 offered him a job, but records show that, after he left, a
13 month later -- and he said we offered him a job, in the
14 deposition, but he didn't take it because his wife was ill.
15 And then on cross-examination, I asked him, here's an e-mail
16 that you wrote. It's a long single-spaced page, e-mail, a
17 proposal that he was making that he come back and be sort of
18 the head of IT at Benecard. And he wrote it, I think, on
19 December 18, to Michael Perry, who was the president of
20 Benecard.

21 And I asked him in his deposition, did you write this
22 e-mail. He said, of course, yes, I did. And I said, so you
23 were seeking a job from Benecard. And he acknowledged that he
24 was. And I said, well, wasn't your wife still ill? And he
25 said, yes.

1 So there were -- there's another point where he says
2 that there's a person that was a business owner that he was
3 testifying about. That person doesn't exist. He actually
4 conflates two different names.

5 There are a number of inaccuracies in his testimony.
6 I didn't put them all in the papers.

7 THE COURT: Let me just ask you, Mr. Pendleton, I'm
8 looking at your declaration, is that long e-mail -- I don't see
9 it attached, at least anything that's jumping out at me as
10 that.

11 THE WITNESS: No. I attached the reference in the --
12 there's a footnote in our brief, Judge, with the reference to
13 the transcript cites.

14 THE COURT: Right.

15 THE WITNESS: The e-mail was an exhibit to the
16 deposition. I did not attach it. I'm happy to attach it for
17 you.

18 THE COURT: Why don't you just go ahead and send that
19 to me.

20 THE WITNESS: I'll do that.

21 THE COURT: I would like to understand, of course,
22 about Mr. Reed as well, as part of this. And I do have his
23 deposition, but some of those materials are useful, not in
24 terms of the merits of the parties' claims vis-a-vis one
25 another, but vis-a-vis aspects of him that might come through

G55ASMAHps

Pendleton

1 in an e-mail.

2 But I do want to get to Ms. Trimarco. And then we can
3 take up other things that you would like to raise. But go
4 ahead. Is there something else, Mr. Pendleton?

5 THE WITNESS: There was one other sort of significant
6 inaccuracy. In his deposition when he was being questioned by
7 Mr. Meyerhoff, there are documents which your Honor will learn
8 about in this case called CAPs, corrective action plans. And
9 the CAPs were issued by the plaintiff Smart to Benecard. Smart
10 would discover that Benecard was doing something wrong or
11 thought it was doing something wrong, and it would issue a CAP,
12 and then Benecard had to respond to the CAP. And there's a lot
13 of dispute about whether we responded timely, accurately,
14 whatever. But these are very important documents in the case.
15 And Mr. Reed in his testimony was testifying that Benecard was
16 issuing the CAPs to Smart. He was completely confused.

17 And my point again is not to disparage Mr. Reed. He
18 was a low-level employee for three months there, three and a
19 half years ago. And his recollection of everything and the
20 people there and what happened was clearly not perfect -- as
21 many witnesses' recollections are not perfect. And his
22 recollection of our conversation -- now, whether or not he and
23 Ms. Nafzinger and Mr. Jones, whether or not -- they say they
24 had not spoken in the few months before their depositions, they
25 had had lunch together a few times, but earlier. So I don't

1 know whether he was somehow aware of the whole issue with
2 Nafzinger and Jones and in his mind thought maybe he shouldn't
3 be talking to Smart.

4 I think what all three witnesses, when you look at
5 their deposition transcripts -- and, your Honor, I would
6 like -- there is some further testimony from Ms. Nafzinger, if
7 it's OK to put it in the record; it came after the submissions
8 to the Court -- that she, when she got my November 15th letter,
9 had no impact on her at all. She had decided on her own that
10 she wasn't going to talk to either side. And Mr. Jones, in
11 advance of his deposition, had dinner with Mr. Meyerhoff for
12 two hours, plus, the night before the deposition. These people
13 freely spoke. Ms. Nafzinger gave documents to Mr. Meyerhoff's
14 office. They came to her house. These people all spoke
15 with -- and we know that Mr. Reed spoke with Mr. Barnowski. So
16 to say that there was interference is -- these people didn't
17 want to speak because they didn't want to get involved.

18 And I would just end by saying, my take on Mr. Reed
19 after his six hours of deposition testimony -- I don't know if
20 that was the running time, but the deposition started at around
21 10 and ended at 4-something -- he is the classic witness who
22 tells Mr. Meyerhoff what he thinks Mr. Meyerhoff wants to hear,
23 and when I questioned him, he told me what he thought I wanted
24 to hear. He wants to please everybody. And frankly that's
25 consistent with what other employees at Benecard who worked

G55ASMAHps

1 with him said about him as well.

2 And so I think that putting all stock in his
3 recollection of that -- and he did not -- he did say, in his
4 deposition, when questioned by Mr. Meyerhoff, that there was no
5 threat of anything by anyone, if he spoke with Smart. He was
6 clear about that. And I didn't get that answer; they did.

7 And I think he also uses the words -- I just want to
8 get it right so that I don't -- "We don't want you talking to
9 anyone else." That's one of the quotes from his dep -- that,
10 that his recollection of the conversation. Now, I wracked my
11 brain about that: Did we have a conversation about
12 attorney-client privilege? Did we talk about, you know,
13 anything that we discussed, did you discuss it with anybody
14 else? Because that is a conversation I typically, I do have
15 with people. I don't recall having that. I don't think this
16 conversation got that deep, because we really didn't have a
17 merits discussion. We didn't talk anything about the merits of
18 the case. And I think I would have had that conversation with
19 him at the follow-up prep meeting. That's typically what I do
20 when I meet with clients to prepare them for depositions.

21 (Witness excused)

22 THE COURT: All right. Let's get Ms. Trimarco out
23 here --

24 MR. MEYERHOFF: If I may, your Honor, just a quick
25 question?

1 THE COURT: A question, yes.

2 MR. MEYERHOFF: Much of what Mr. Pendleton said had
3 nothing to do with what happened from his recollection of the
4 call.

5 THE COURT: It does help me put things in context.

6 MR. MEYERHOFF: I understand.

7 THE COURT: It does indicate to me that I need to
8 watch the entirety of Mr. Reed's deposition before I would ever
9 sort of rely upon sort of snippets of it, just because it
10 sounds like that -- I didn't watch enough of it to understand
11 whether or not he's a yes man.

12 MR. MEYERHOFF: I understand, your Honor. I just,
13 most of what Mr. Pendleton just said was argument, and I just
14 want to know whether I will have the opportunity to respond.

15 THE COURT: Yes. At the end of the session, what
16 we'll do is, I will give you -- I will. And I actually was
17 thinking the same thing in terms of what's occurred. But I
18 think it was, from my perspective, useful. And so I didn't
19 want to cut him off unnecessarily, because it puts things in
20 context.

21 Joe, let's go ahead and bring out Ms. Trimarco. And
22 she can come on over back to her chair.

23 All right, Ms. Trimarco, you can come on over back to
24 your chair.

25 THE COURT: And I'm going to have you remain standing.

G55ASMAHps

Trimarco

1 I'm going to have Joe -- what we're going to do is, Joe is
2 going to just undertake the formality of putting under oath.
3 I, again, don't have any reason to believe that if you were not
4 under oath, that you would give me anything other than truthful
5 testimony. It's just to ensure that our record is as it you
6 had sh be.

7 All right, Joe, go ahead.

8 GINA TRIMARCO,

9 called as a witness, having been duly sworn, testified as
10 follows:

11 THE COURT: All right, Ms. Trimarco. I'm going to
12 have you keep your voice -- make sure your voice is up so we
13 can get a good clear record.

14 Tell me what happened during that -- everything you
15 can recall about what happened during that phone call on
16 January 28.

17 THE WITNESS: So, on January 28 -- I think we had
18 actually tried to reach Mr. Reed on the 26th but were
19 unsuccessful. And we tried again on the morning of the 28th.
20 I can't remember if I called John or he called me. He was not
21 in the office. We got together on the phone. This was a
22 common practice we had, when I was in the office and he was
23 out, even if he was in. So I used the office phone,
24 conferenced us all together and tried Mr. Reed again. I think
25 he happened to just pick up that day. Typical of these former

1 employees that we were trying to reach.

2 And it was a really short conversation. I think it
3 started out -- now, this is the gist, not the exact words --
4 something along the lines of John talking, hi, you know, I'm
5 Mr. Pendleton, I represent your former employer, Benecard,
6 there's a lawsuit, do you recall Smart Insurance Company and
7 the work that Benecard did for them, they're suing us, and I
8 think maybe he told him a little bit about like breach of
9 contract, and just they're looking for a deposition, to take
10 your deposition -- I don't know if he put a date or -- but,
11 we're trying to reach out to you to determine if you would be
12 cooperative in appearing for the deposition, if you would be
13 willing to speak with us ahead of time, you know, go over
14 the -- not the case, but just, you know, your role, your
15 position, your work there, your memory, and, you know,
16 cooperate.

17 And I don't remember anything coming up either way
18 about -- we would not have instructed him not to speak to
19 Smart, absolutely, never. And not even in connection
20 necessarily with the order. It's not something -- when we're
21 first reaching out to a former employee and we don't even know
22 if they're going to be cooperative, it's just not something --
23 it's not proper. If anything -- this is not with Mr. Reed --
24 but other people where we're not sure if they're going to
25 cooperate or kind of feeling out, you know, what this is all

1 about, you know, we would tell them, we're not your attorneys,
2 you're a former employee, if you decided to cooperate, that
3 could change, but right now, you know, you can speak to them,
4 you don't have to -- "them" meaning Smart -- you don't have to
5 speak to either Smart or to us. You can. It's your choice.
6 If you decide to come and cooperate and now we're representing
7 you for the deposition, that could be different, but, you know,
8 we get to that down the road. And we would also try to set up,
9 you know, a further phone interview or, depending on where the
10 person lived, an in-person interview to really try to get to
11 know them and feel them out.

12 And I don't remember this conversation getting into
13 any of that either way. I remember that Mr. Reed was
14 cooperative, you know, oh, sure, yes, I remember, I remember
15 Smart, I remember Benecard, yes, yes, yes, you know, and maybe
16 even, you know, I remember, you know, I worked there -- but
17 not, like I'm not trying to say he's, you know, he remembered
18 details or anything. Most people are like, well, I don't
19 remember anything about my work. They're naturally a little
20 hesitant to -- they don't want to be involved.

21 And I think it just kind of went like that. And we
22 made plans to make sure we had his contact information, an
23 updated e-mail address, which is part of the reason for me
24 being on the call. And he would have known that I was on the
25 call. At the very beginning when John was introducing himself,

G55ASMAHps

Trimarco

1 he would have said, and I have so-and-so also on the call.
2 Because it's almost a little awkward when you're trying to call
3 people from the two different places. And it's -- I'll end up
4 having to say something or -- because I'm the one taking down
5 the e-mail address, the information, making sure we follow up,
6 follow through, set up a meeting or whatever. And I just
7 remember it being a very quick, over with, you know, this is
8 who we are, this is why we're calling you. And I remember him
9 being like pretty nice and, sure, I'll meet with you. But, you
10 know, on the other hand, a lot of people have said that and
11 then we can never reach them again.

12 So -- and that's really all I remember about it, you
13 know. He just, he was like, sure, I'll meet with you. And
14 then I was the one who tried to follow up with him, and was
15 never able to reach him again.

16 THE COURT: All right. So let me just ask a general
17 question. Do you recall whether he ever said anything
18 generally speaking along the lines of, hey, what if Smart
19 calls, should I be talking to them, or, should I not be talking
20 to Smart, or, what should I do if Smart calls? Did he ask any
21 questions that --

22 THE WITNESS: No.

23 THE COURT: -- sort of threw in your direction, what
24 do I do in that kind of situation?

25 THE WITNESS: No, I don't recall. And in fact, I want

G55ASMAHps

Trimarco

1 to say I don't even think we knew he had talked to Smart at
2 that point, like it didn't get into that either way. And I
3 don't think that we -- I don't think he even gave us a hint
4 that Smart had been reaching for him. And I'm trying to
5 like -- I hope I'm not misremembering on this. But I really
6 don't think we ever -- he was not one of the people who we
7 considered like kind of in the middle of the, the actions on
8 this case. He was kind of -- he was on the custodian list as
9 e-mail custodian, which is how he first came to our attention.
10 He was never somebody -- I was kind of the person who was in
11 charge of the e-discovery, who would sort of escalate, well,
12 these are the sort of people who should know about the case.
13 He wasn't one of them, but he was custodian. So we had been
14 trying to reach him even prior to this, just because, well,
15 Smart is interesting in him, they're probably going to want to
16 depose him, we should reach out to this person. Had no luck.
17 We got into a phone conversation that I put in the declaration
18 along with my contemporaneous notes. I used to carrying my
19 laptop around the office.

20 But -- so we knew that, you know, he was someone of
21 interest coming up. And -- but I don't think we ever knew that
22 Smart had been reaching out to him. I don't remember him
23 saying anything about that either way. Or we might have ended
24 up into more of that conversation. But, I mean, I can tell
25 you, we had -- the question you asked me about, did Smart --

G55ASMAHps

Trimarco

1 what do I do if Smart tries to reach me, we've had other
2 witnesses ask that question, and we tell them, you're allowed
3 to talk to them. You know, it depends; if somebody who is
4 actually to come in, who we're going to prep for a deposition,
5 that might get into a little, OK, so what we talked about when
6 we're preparing for the deposition is attorney-client privilege
7 and you should not repeat that. I don't think it ever got to
8 that point with him. With other people, I mean, our standard
9 thing was, of course you could -- you can talk to them. You
10 just don't have to talk to them. Just like you do not have to
11 talk to us. Yes, we're representing your former employers, but
12 you don't have to talk to us. It's your choice. Both sides,
13 either way. And that was our practice, always.

14 THE COURT: And before this morning, and sort of --
15 but after I issued my most recent orders setting today's
16 hearing, did you and Mr. Pendleton talk about that
17 conversation, in preparation for today?

18 THE WITNESS: We did.

19 THE COURT: Directly?

20 THE WITNESS: Directly. We tried to, hey, what do you
21 remember, what do you remember, did you -- you know, how could
22 he have said this, did we get into attorney-client privilege or
23 not. I didn't think we did. I didn't remember it.

24 THE COURT: All right. Thank you, Ms. Trimarco. Is
25 there anything else that you want to add?

1 THE WITNESS: No.

2 THE COURT: All right. Thank you very much.

3 THE WITNESS: Thank you.

4 (Witness excused)

5 THE COURT: All right. I will thank you both of you
6 for undergoing this and giving the Court that information.

7 I did say that I would allow Mr. Barnowski to
8 respond --

9 MR. MEYERHOFF: It's Mr. Meyerhoff.

10 THE COURT: I'm sorry. Mr. Meyerhoff. I'm sorry.

11 MR. MEYERHOFF: It's OK. We're often confused.

12 THE COURT: -- Mr. Meyerhoff an opportunity to respond
13 with some comments that Mr. Pendleton had made, not the content
14 of -- don't argue about whether or not they're right or wrong
15 in their recollections. But if there were other things that
16 they added in that were regarding, particularly Mr. Pendleton,
17 about the overall case and other inaccuracies of Mr. Reed that
18 you want to respond to, that's fine. But I'll determine the
19 facts as to the rest of it.

20 MR. MEYERHOFF: I'm not going to argue what they swore
21 to under oath with respect to what they said to Mr. Reed. But
22 a lot of what I remembered, your Honor, is argument of the
23 points that we were making in our briefing and I just want --

24 THE COURT: From Mr. Pendleton, yes. And so go ahead
25 and talk about those.

G55ASMAHps

1 MR. MEYERHOFF: I just wanted an opportunity to
2 respond. But also from Ms. Trimarco, who just said that we
3 would never instruct a witness not to talk to Smart, that's not
4 what we do. I need to remind the Court that the reason this
5 all happened is because they did exactly that.

6 THE COURT: OK. So that's arguing sort of the merits
7 again. So let's just leave that. I think whatever
8 Ms. Trimarco said seemed to be directly within the contours of
9 what I had in the order, and I don't want to be arguing that
10 right now.

11 MR. MEYERHOFF: All right. I'm not quite sure where
12 the line is drawn, so --

13 THE COURT: You can talk about anything other than the
14 January 28th phone call. That's the line.

15 MR. MEYERHOFF: There's a suggestion in the deposition
16 from Mr. Pendleton that Mr. Reed spoke to Mr. Jones or
17 Mr. Nafzinger and that might be where he got the idea in his
18 head that he wasn't supposed to talk to Smart. I am very
19 concerned about that assertion by Mr. Pendleton. I was at all
20 of those depositions. That did not happen. Mr. Pendleton has
21 essentially implied that this could have been the reason why
22 Mr. Reed was mistaken, that he got information from one of
23 those other two witnesses. I asked him to demonstrate that
24 with the testimony. I do not believe there is any testimony to
25 support that as a possibility for why Mr. Reed was mistaken.

1 THE COURT: All right. I'm just, I'm pausing because
2 I don't believe I recall it quite like that. But I will look
3 back at the transcript from today.

4 MR. MEYERHOFF: OK. Mr. Pendleton also suggested that
5 there may have been an attorney-client privileged discussion
6 and --

7 THE COURT: No, he was saying that there was not.

8 MR. MEYERHOFF: But that he sometimes does that, and
9 that he created the implication that, even though he doesn't
10 remember it, that might be why Mr. Reed has said what he said.

11 THE COURT: I think, that's the kind of thing, let's
12 leave that out. That's all about the January 28th
13 conversation.

14 What I really want you to address is, Mr. Pendleton
15 did make remarks regarding Mr. Reed, generally speaking, saying
16 contradictory things. I think the most interesting to the
17 Court is whether or not he was just wrong about, for instance,
18 the CAPs issue. I mean, was he getting things just wrong, not
19 intentionally, as a bad guy. He may be the kind of guy who
20 gets mixed up sometimes. And so that kind of thing, if some of
21 those facts which Mr. Pendleton indicated to the Court were in
22 play, if those were wrong, then I would be very interested in
23 that. But in any event I'm going to go back through the
24 deposition, the whole thing.

25 MR. MEYERHOFF: I think my response to that, your

G55ASMAHps

1 Honor, is that there's a qualitative difference between what
2 Mr. Reed, completely unprepared for the deposition on either
3 side because he did not see a single document because we had no
4 time -- we had no opportunity to work with him and
5 Mr. Pendleton had no opportunity to work with him. What he
6 remembers about what happened three years ago and whether he
7 might have been confused about a particular fact --

8 THE COURT: So he was confused, but you're saying his
9 recollection -- I'm just trying to figure out whether or not he
10 was in fact confused about some events three years ago. It
11 sounds like he was. But it sounds like -- I understand your
12 point, which is, your recollection of six weeks prior might be
13 better than it would be three years prior. I understand that
14 argument. I just want to find out, really, for me as a
15 fact-finding proceeding.

16 MR. MEYERHOFF: I understand. I wouldn't characterize
17 him as being confused. I think the testimony will speak for
18 itself. And Mr. Pendleton is an aggressive cross-examiner. If
19 he had the opportunity to exploit some confusion, it's there,
20 and the Court can see it. I think Mr. Reed demonstrated a
21 clear recollection of facts that we believe are supportive of
22 Smart's case, specifically, that he was told by his superiors
23 not to tell the whole truth to Smart.

24 THE COURT: I saw that in your papers and those
25 arguments in terms of why you might find him to be a useful

G55ASMAHps

1 witness for you. That's all on the merits and I understand
2 that that will come up later in the case.

3 MR. MEYERHOFF: I do think, your Honor, there's a
4 difference between not remembering whether he had a short
5 telephone call saying he would attend a deposition and.
6 Exchanging voicemail to that effect and actually remembering a
7 fact. The suggestion that he had a faulty memory, which
8 Mr. Pendleton argues at length about, that doesn't really
9 strike me as the same thing that he came up with these facts
10 and volunteered them. I think that's a qualitative difference.
11 That's why we made the motion. We had many arguments as to why
12 we think what Mr. Pendleton has said in his papers are
13 unreliable. And I think that would apply to most of what was
14 said today. And with that I'll sit down, your Honor.

15 THE COURT: All right. I want to thank you folks for
16 coming in today and allowing the Court to gather the facts that
17 are necessary to full resolution of this motion. And what I'm
18 going to do is, I want to go back and sit down with the
19 videotape running in the background, and I want to watch more
20 of Mr. Reed and try to get a better sense of him. And then I
21 now have a better sense from you folks of the conversations as
22 well. So it's been very helpful for me. But I don't think
23 there's any reason to do anything else today. And I think
24 that, unless you folks have something further, I think we're
25 adjourned.

1 Anything further from you folks? Mr. Pendleton.

2 MR. PENDLETON: No, thank you, your Honor.

3 THE COURT: Mr. Meyerhoff.

4 MR. MEYERHOFF: No, your Honor.

5 THE COURT: Thank you. We are adjourned.

6 o0o

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25